

### **REMARKS**

Claims 5, 6, 8-14, 17-20, 23 and 27 are pending. Reconsideration of this application in light of the foregoing amendments and following remarks is requested.

#### **Rejections under 35 U.S.C. § 102**

Claim 27 stands rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent Number 6,490,632 to Vepa et al. (hereinafter “Vepa”). Applicants respectfully traverse the Examiner’s position for the following reasons.

The PTO provides in MPEP § 2131 that

*“[t]o anticipate a claim, the reference must teach every element of the claim....”*

Applicants submit that Vepa fails to teach every element of claim 27. In particular, Vepa fails to teach or suggest at least

*assigning a predetermined network adapter as a primary network adapter for providing network access*

and

*determining whether the first or second network access technology is active on the first or second network adapter, respectively, in a physical layer (L1) by monitoring a packet traffic and a hardware status of the first and second network adapters*

as recited in claim 27. Indeed, the Examiner does not, and Applicants submit that the Examiner cannot, point to any portion of the cited reference in which the first element is taught or suggested. With regard to the second element, the Examiner points to column 13, lines 32-34, of Vepa as teaching “[d]etermining an active network adapter by monitoring packet traffic and hardware status of one or more network adapters” (emphasis added). Even assuming *arguendo* that this is a correct characterization of the teachings of Vepa, the relevant limitation of claim 27 clearly recites “determining whether the first or second network access technology is active” (emphasis added). Clearly, there is a distinction between an active “network adapter” and an

active “network access technology”. In particular, while Vepa anticipates, and in fact, relies on, more than one NIC being active at a given time in order to achieve load balancing (*see* Vepa, column 13, lines 32-34), the subject language of claim 27 requires that only one network access technology (“the first or second network access technology is active”) be active at a given time.

In view of the fact that Vepa fails to teach every element of claim 27, it is apparent that the rejection of claim 27 under 35 U.S.C. §102(e) is not supported by Vepa and should therefore be withdrawn.

**Rejections under 35 U.S.C. § 103**

Claims 5, 6, 8, 10-14, 17-20, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Vepa in view of U.S. Patent No. 6,064,649 to Jones (hereinafter “Jones”). Claim 9 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Vepa in view of Jones and further in view of U.S. Patent No. 6,393,483 to Latif et al. (hereinafter “Latif”). Applicants respectfully traverse the subject rejection on the grounds that the cited combination of references is defective in establishing a *prima facie* case of obviousness with respect to the claims.

As the PTO recognizes in MPEP §2142:

*The examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. If the examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of nonobviousness.*

It is submitted that, in the present case, the Examiner has not factually supported a *prima facie* case of obviousness for at least the following, mutually exclusive, reasons.

**1. Even When Combined, the References Do Not Teach the Claimed Subject Matter**

The Vepa and Jones patents cannot be applied to reject independent claims 5, 11, 17, and 23, under 35 U.S.C. §103 because, even when combined, the references do not teach the claimed subject matter.

Claims 5, 6, and 8-10

With regard to claim 5, the Examiner states, on page 5 of the Office action, “Vepa shows substantial features of the claimed invention including:” and then continues with a non-exhaustive list of elements recited in claim 5 and supposedly taught by Vepa. However, the Examiner’s argument fails to specifically address at least the following elements of claim 5:

*providing a network access arbitrator having a virtual anchor adapter driver;*

*configuring, by the network access arbitrator, the data packets generated by the active network application to continue the network application when the access to the network hardware platform is switched from the primary network adapter to the active network adapter driver . . . ;*

and

*wherein the network application detects only the network arbitrator when accessing the networked hardware platform, and wherein the source and destination hardware addresses of the data packet are not changed if the primary network adapter is used.*

Additionally, not only does the Examiner’s argument fail to address all of the elements and limitations of claim 5, it addresses elements that are not included in claim 5 (i.e., “The engagement of the active network adapter is invisible to the active network application” and “The NAA defines a virtual anchor adapter driver that is known only to the adapter driver”).

The Examiner concedes, on page 6 of the Office action, that “Vepa does not explicitly show the network adapters are based on different access technologies” and cites Jones as remedying the deficiencies of Vepa in this regard. Applicants traverse the Examiner’s position in this regard; however, even assuming *arguendo* that the Examiner’s position is correct, the combination of Vepa and Jones still fails to teach or suggest at least the above-noted elements clearly recited in claim 5.

Accordingly, the Examiner has failed to meet the burden of factually supporting a prima facie case of obviousness imposed on him by MPEP §2142; therefore, Applicants submit that claim 5 is in condition for allowance. Claims 6 and 8-10 depend from and further limit claim 5 and are allowable for at least the same reasons as claim 5.

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### Claim 23

Claim 23 includes elements similar in all relevant respects to those of claim 5; therefore, claim 23 is allowable for at least the same reasons as set forth above with respect to claim 5.

### Claims 11-14

With regard to claim 11, the Examiner states, on page 7 of the Office action, “Vepa shows substantial features of the claimed invention including:” and then continues with a non-exhaustive list of elements recited in claim 11 and supposedly taught by Vepa. However, the Examiner’s argument fails to specifically address at least the following elements of claim 11:

*identifying the first network adapter driver as inactive and the second network adapter driver as active after no packets are received by the network access arbitrator from the first network adapter driver for a predetermined period of time and after at least one packet is received by the network access arbitrator from the second network adapter driver within the predetermined period of time;*

Additionally, the Examiner’s position that Vepa teaches “utilizing the first data link layer network access technology” and “selecting the second data link layer network access technology” is clearly in error, as the Examiner concedes that Vepa fails to teach multiple network access technologies.

Specifically, the Examiner states, on page 8 of the Office action, that “Vepa does not explicitly show the network adapters are based on different access technologies” and cites Jones as remedying the deficiencies of Vepa in this regard. Applicants traverse the Examiner’s position in this regard; however, even assuming *arguendo* that the Examiner’s position is correct, the combination of Vepa and Jones still fails to teach or suggest at least the above-noted elements clearly recited in claim 11.

Accordingly, the Examiner has failed to meet the burden of factually supporting a prima facie case of obviousness imposed on him by MPEP §2142; therefore, Applicants submit that

claim 11 is in condition for allowance. Claims 12-14 depend from and further limit claim 11 and are allowable for at least the same reasons as claim 11.

### Claims 17-20

Claim 17 includes elements similar in all relevant respects to those of claim 11; therefore, claim 17 is allowable for at least the same reasons as set forth above with respect to claim 11.

Claims 18-20 depend from and further limit claim 17 and are allowable for at least the same reasons as claim 17.

## **2. The Combination of References is Improper**

There is still another compelling, and mutually exclusive, reason why the Vepa and Jones patents cannot be combined and applied to reject claims 5, 11, 17, and 23 under 35 U.S.C. §103(a).

The PTO also provides in MPEP §2142:

*[T]he examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. In view of all factual information, the examiner must then make a determination whether the claimed invention "as a whole" would have been obvious at that time to that person. . . . [I]mpermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art.*

In the present case, neither Vepa nor Jones teaches or even suggests the desirability of the combination. On the contrary, Vepa teaches a system for providing high performance load balancing and fail-over support of IP exchange traffic over multiple NICs. In contrast, Jones an automatic media switching apparatus for automatically switching a user device between wired and wireless service mediums of communications networks. Thus, these patents provide any incentive or motivation supporting the desirability of the combination. Therefore, there is simply no basis in the art for combining the references to support a 35 U.S.C. §103(a) rejection of claims 5, 11, 17, and 23.

In this context, the MPEP further provides at §2143.01:

*The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination.*

In the above context, the courts have repeatedly held that obviousness cannot be

established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination. In the present case it is clear that the Examiner's combination arises solely from hindsight based on the invention without any showing, suggestion, incentive or motivation in either reference for the combination as applied to claims 5, 11, 17, and 23. The Examiner's unsupported opinion that "it would have been desirable" to modify the system of Vepa "so as to use different access technologies for one or more of the NICs" is, without more, simply that—an opinion.

Accordingly, for this mutually exclusive reason, the examiner's burden of factually supporting a *prima facie* case of obviousness clearly cannot be met with respect to claims 5, 6, 8-14, 17-20, and 23 and the rejection under 35 U.S.C. §103(a) is not applicable and should be withdrawn.



**Conclusion**

In view of the foregoing, it is apparent that independent claims 5, 11, 17, 23, and 27 are now in condition for allowance. Claims 6, 8-10, 12-14, and 18-20 depend from and further limit claims 5, 11, and 17 and are therefore also deemed to be in condition for allowance. An early formal notice of allowance of all pending claims is therefore respectfully requested.

The Examiner is invited to call the undersigned at the below-listed telephone number if a telephone conference would expedite or aid the prosecution and examination of this application.

Respectfully submitted,



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